

No. 11405

15. 2452
United States

Circuit Court of Appeals

For the Ninth Circuit.

PAUL A. PORTER, Administrator of the Office
of Price Administration,

Appellant,

vs.

PAUL MYERS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

OCT 26 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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District Enforcement Attorney,

Office of Price Administration,

17 West Van Buren

Phoenix, Arizona

Attorney for Appellant.

KNAPP, BOYLE & THOMPSON,

Valley National Building,

Tucson, Arizona

Attorneys for Appellee. [3*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

Civ. No. 273—Tucson

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff,

vs.

PAUL MYERS,

Defendant.

COMPLAINT FOR TREBLE DAMAGES

Under the Emergency Price Control Act of 1942
(P. L. 421, 77th Congress, 2nd Session, 56 Stat.
23), as amended, for violations of Maximum
Price Regulation No. 259.

Plaintiff complains and alleges as follows:

1. Plaintiff, as Administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (P. L. 421, 77th Cong. 2nd Session, 56 Stat. 23), as amended by the Stabilization Extension Act of 1944, hereinafter called the "Act".

2. Jurisdiction of this action is conferred upon this court by Sections 205(e) and 205(c) of the Act.

3. That under and by virtue of the authority vested in the Price Administrator by the Act and Executive Order No. 9250, the Administrator of

the Office of Price Administration duly promulgated and issued Maximum Price Regulation No. 259 (7 F. R. 8950) to become effective November 1, 1942, establishing maximum prices for the sale by all sellers of domestic malt beverages within the continental limits of the United States; that said Maximum Price Regulation No. 259, issued as aforesaid, as the same has been amended, is now and at all times herein mentioned has been in full force and effect. [4]

4. That the said defendant, Paul Myers, is a resident of the City of Tucson, County of Pima, State of Arizona, and at all times herein mentioned, at the aforesaid place, has been and now is engaged in the business of buying, selling, distributing and otherwise dealing in "domestic malt beverages" in the capacity of a "wholesaler" as said terms are defined by the said Maximum Price Regulation No. 259.

5. That between December 1, 1943, and August 26, 1944, in the County of Pima, State of Arizona, and within the jurisdiction of this court, the said defendant offered for sale and sold to numerous purchasers at wholesale large quantities of domestic malt beverages, to-wit: beer, at prices in excess of the legal maximum prices provided by said Maximum Price Regulation No. 259; that attached hereto as "Exhibit A" and by reference incorporated herein is a tabulation by calendar months covering the aforesaid period showing the brands, container sizes and quantities of beer sold

by the said defendant as aforesaid, the sale price, the ceiling price, the amount of overcharge per case, and the total amount of overcharges demanded and received by the said defendant in the sale of said beer.

6. That the aforesaid sales, and each of them, were made at wholesale in the course of trade or business and not to ultimate consumers; that the amount by which the price demanded and received by the said defendant for said beer exceeded the maximum price therefor, as established by the applicable provisions of said Maximum Price Regulation No. 259, was the sum of twenty-eight thousand six hundred ninety-one and $74/100$ dollars (\$28,691.74), as more fully appears from Exhibit A attached hereto; that treble the aggregate amount of said overcharges demanded and received by said defendant, as aforesaid, is the sum [5] of eighty-six thousand seventy-five and $22/100$ dollars (\$86,075.22).

Wherefore, plaintiff prays judgment against the said defendant that plaintiff have and recover of and from the said defendant, Paul Myers, on behalf of the United States of America, the sum of eighty-six thousand seventy-five and $22/100$ dollars (\$86,075.22), and for such other and further relief as to the court may appear just and lawful in the premises.

Dated at Phoenix, Arizona, this 17th day of November, 1944.

/s/ DARRELL R. PARKER,
District Enforcement Attorney.

/s/ LLOYD J. ANDREWS,
Assistant Enforcement Attorney.

/s/ DAVID O. BROWN,
Assistant Enforcement Attorney.
Attorneys for Plaintiff
Office of Price Administration
17 West Van Buren Street
Phoenix, Arizona.

[Endorsed]: Filed Nov. 18, 1945. [6]

1944 June		Extra Charges—Delivery and Storage				—	3,527	74.00	3,060.61
	Heinies 12 oz.	1-4	3.95	3.17	.78	17		13.26	
		5-9	3.95	3.12	.83	29		24.07	
		10-24	3.95	3.07	.88	565		497.20	
		25 or over	3.95	2.97	.98	1,775	2,386	1,739.50	2,274.03
	Premium Premo 12 oz.	5-9	3.95	3.70	.25	4		1.00	
	25 or over	3.95	3.55		.40	1,500	1,504	600.00	601.00
	Extra Charges—Delivery and Storage						3,890	72.50	2,947.53

EXHIBIT A

DETAILED SUMMARY OF OVERCHARGES ON WHOLESALE BEER SALES

FROM DECEMBER 1, 1943 TO AUGUST 31, 1944

Period Involved	Brackets Beer Involved, before addition for Arizona State Liquor Tax	Case Lost	Per Case		Detail	Number of Cases		Detail	Amount of Overcharge	
			Sales Price	Colling Over-		Brand	Monthly Totals		Brand	Monthly Totals
1943	December	ABC Supreme 12 oz.	25 or over 2.96	2.76	.20	100		20.00		
			25 or over 2.86	2.76	.10	1,335		133.50		153.50
		Heinies 12 oz.— Clifton	25 or over 3.33	3.08	.25	1,435		358.75		358.75
		Extra Charges—Delivery and Storage				—	2,870		138.00	650.25
1944	January	ABC Supreme 12 oz.	25 or over 2.96	2.76	.20	100		20.00		
			25 or over 2.88	2.76	.12	2,025		243.00		
			25 or over 2.86	2.76	.10	2,870	4,995	287.00		550.00
		Heinies 12 oz.	25 or over 3.43	2.90	.53	1,490	1,490	789.70		789.70
		Extra Charges—Delivery and Storage				—	6,485		208.50	1,549.20
February		ABC Supreme 12 oz.	25 or over 2.86	2.76	.10	676	676	67.60		67.60
		ABC Supreme 32 oz.	25 or over 3.20	3.09	.11	180	180	19.80		19.80
		Heinies 12 oz.	25 or over 3.43	2.90	.53	1,400	1,400	742.00		742.00
		Extra Charges—Delivery and Storage				—	2,256		160.00	989.40
March		ABC Supreme 12 oz.	25 or over 2.86	2.76	.10	2,054	2,054	205.40		205.40
		Heinies 12 oz.	5-9	3.88	3.05	.83	10	8.30		
			10-24	3.88	3.00	.88	30	26.40		
			25 or over 3.88	2.90	.98	3,440	3,440	3,332.00		3,366.70
		Yankee 32 oz.	25 or over 4.65	3.63	1.02	1,400	1,400	1,428.00		1,428.00
		Extra Charges—Delivery and Storage				—	6,894		184.50	5,184.60
April		ABC Supreme 12 oz.	25 or over 2.93	2.83	.10	450	450	45.00		45.00
		ABC Supreme 32 oz.	25 or over 3.29	3.18	.11	155	155	17.05		17.05
			25 or over 3.26	3.18	.08	30	185	2.40		19.45
		Heinies 12 oz.	10-24	4.07	3.07	1.00	5	5.00		
			5-9	4.00	3.12	.88	5	4.40		
			10-24	3.95	3.07	.88	30	26.40		
			25 or over 3.95	2.97	.98	2,160	2,160	2,116.80		
			25 or over 3.88	2.97	.91	50	2,250	45.50		2,198.10
		Yankee 32 oz.	25 or over 4.74	3.72	1.02	600	600	612.00		612.00
		Extra Charges—Delivery and Storage				—	3,485		87.50	2,962.05
May		ABC Supreme 12 oz.	25 or over 2.93	2.83	.10	475	475	47.50		47.50
		Heinies 12 oz.	1-4	3.95	3.17	.78	7	5.46		
			5-9	3.95	3.12	.83	25	20.75		
			10-24	3.95	3.07	.88	860	756.80		
			25 or over 3.95	2.97	.98	1,090	1,982	1,068.20		1,851.21
		Yankee 32 oz.	10-24	4.74	3.82	.92	35	32.20		
			25 or over 2.74	3.72	1.02	1,035	1,070	1,055.70		1,087.90
		Extra Charges—Delivery and Storage				—	3,327		74.00	3,060.61
1944	June	Heinies 12 oz.	1-4	3.95	3.17	.78	17	13.26		
			5-9	3.95	3.12	.83	29	24.07		
			10-24	3.95	3.07	.88	565	497.20		
			25 or over 3.95	2.97	.98	1,775	2,386	1,739.50		2,274.03
		Premium Premo 12 oz. 25 or over 3.95 3.55	5-9	3.95	3.70	.25	4	1.00		
		Extra Charges—Delivery and Storage				—	3,890		600.00	2,947.53
July		ABC Supreme 12 oz.	25 or over 2.93	2.83	.10	930	930	93.00		93.00
		Heinies 12 oz.	1-4	3.95	3.17	.78	1	.78		
			5-9	3.95	3.12	.83	25*	20.75		
			10-24	3.95	3.07	.88	1,765*	1,553.20		
			25 or over 3.95	2.97	.98	2,280	4,071	2,234.40		3,809.13
		Yankee 32 oz.	10-24	4.74	3.82	.92	10	9.20		
			25 or over 3.95	2.97	1.02	1,450	1,460	1,479.00		1,488.20
		Capitol 12 oz.	5-9	3.65	3.13	.52	5	2.60		
			10-24	3.65	3.08	.57	235	133.95		
			25 or over 3.65	2.98	.67	2,746	2,986	1,839.82		1,976.37
		Extra Charges—Delivery and Storage				—	9,447		178.10	7,544.80
August**		ABC Supreme 12 oz.	25 or over 2.93	2.83	.10	1,600	1,600	160.00		160.00
		Heinies 12 oz.	10-24	3.95	3.07	.88	50	44.00		
			25 or over 3.95	2.97	.98	110	160	107.80		151.80
		Yankee 32 oz.	10-24	2.74	3.82	.92	10	9.20		9.20
		Capitol 12 oz.	10-24	3.65	3.08	.57	410	233.70		
			25 or over 3.65	2.98	.67	1,385	1,795	927.95		1,161.65
		Capitol 32 oz.	10-24	4.16	3.53	.63	240	151.20		
			25 or over 4.16	3.43	.73	2,739	1,999.47	2.00		
			1-4	4.13	3.63	.50	1	.60		
			10-24	4.07	3.53	.54	12	6.18		2,159.15
		Extra Charges—Delivery and Storage				—	6,560		161.50	3,803.30
		TOTALS					45,414			\$28,691.74

* Includes 150 cases of Heinies Beer billed on July 31, 1944. Invoices which were not entered on the books until August 1, 1944.
 ** Month of August checked only until the 28th. Invoices billed after this date were to be computed at selling rate.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT
FOR TREBLE DAMAGES

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

Defendant, for his answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs 1, 2 and 4 of said complaint, but in answer to paragraph 3 of said complaint, defendant denies that the Maximum Price Regulation No. 259 has the force and effect of law.

II.

Admits that "between December 1, 1943, and August 26, 1944, in the County of Pima, State of Arizona, and within the jurisdiction of this court, the said defendant offered for sale and sold to numerous purchasers at wholesale large quantities of domestic malt beverage, to-wit: beer" but denies that any of said beer so offered for sale and sold by the defendant to such purchasers was offered for sale or was sold at prices in excess of the maximum price therefor as established by the applicable provisions of Maximum Price Regulation No. 259, referred to in plaintiff's complaint, or by the General

Maximum Price Regulation theretofore promulgated and issued by said [10] Administrator, but, on the contrary, alleges that all of the sales mentioned and described in Exhibit "A" to plaintiff's complaint were made at or below maximum prices provided by Maximum Price Regulation No. 259 and said General Maximum Price Regulations.

III.

In answer to the allegations contained in Paragraph 6 of said complaint, defendant admits that said sales and each of them were made at wholesale in the course of trade or business and not to the ultimate consumer, but denies that the price demanded and received by defendant exceeded the maximum price therefor as established by the applicable provisions of said Maximum Price Regulation No. 259 and the applicable provisions of said General Maximum Price Regulation, in the aggregate sum of \$28,691.74, or in any other amount. Defendant admits the making of the sales mentioned, set forth and described in Exhibit "A", but denies specifically each and every other allegation contained in said complaint and in said Exhibit "A".

IV.

Defendant further alleges that all of the sales made by defendant and referred to in plaintiff's complaint were made at prices which were computed in accordance with the business and cost practices or methods established in the brewery and distillery products industry prior to the enactment

of said Emergency Price Control Act referred to in plaintiff's complaint.

V.

Defendant, as a further and separate answer to said complaint, alleges: That if it should be established that any of the sales mentioned, set forth and described in plaintiff's complaint* were made in violation of said Maximum Price Regulation No. 259, that such violation of such regulation by this defendant was neither willful nor the result of failure on defendant's part [11] to take practicable precautions against the occurrence of the violation.

Wherefore, defendant prays judgment dismissing the complaint, for his costs and for such other relief as the court may deem just.

KNAPP, BOYLE & THOMP-
SON

B. G. THOMPSON,
ARTHUR HENDERSON,
Attorneys for Defendant
910 Valley National
Building
Tucson, Arizona.

MEMORANDUM OF POINTS IN
SUPPORT OF FIRST DEFENSE

The Court takes judicial notice of all of the matters appearing in the Federal Register. It appears from said Federal Register that no statement of

the considerations involved in the issuance of Maximum Price Regulation No. 259 was published in said Federal Register, as provided by Title 50, USCA, Sections 902, 921. It appears from said Federal Register that while Maximum Price Regulation No. 259 was published, no statement of the considerations involved in the issuance of said regulation was likewise published but said statement was merely filed with the Division of Federal Register. Until and unless such statement of the considerations involved in the issuance of Maximum Price Regulation No. 259 are likewise published in the Federal Register, the said Maximum Price Regulation No. 259 could not have the force of law, nor can it be made the basis of any cause of action against this defendant as set forth in the complaint herein.

[Endorsed]: Filed Jan. 10, 1945. [12]

[Title of District Court and Cause.]

STIPULATION FOR JUDGMENT

Come now the attorneys undersigned for the above-named plaintiff and defendant respectively and stipulate and agree as follows:

1. That jurisdiction of this action is conferred upon this court by Section 205(c) and (e) of the Emergency Price Control Act of 1942, as amended.

2. That pursuant to the Act the Price Administrator has heretofore duly promulgated and issued

Maximum Price Regulation No. 259, which became effective on November 1, 1942, and, as amended, has been in full force and effect at all times thereafter until the revision thereof which became effective December 18, 1944; that said Maximum Price Regulation No. 259 establishes maximum prices for the sale at wholesale of domestic malt beverages within the continental limits of the United States.

3. That Paul Myers, the defendant herein, is and at all times pertinent hereto has been a resident of the City of Tucson, County of Pima, State of Arizona, and engaged in the business of buying, selling, and distributing at wholesale and in the capacity of a "wholesaler" of "domestic malt beverages" as said terms are defined by said Maximum Price Regulation No. 259.

4. That during the period December 1, 1943, to August 26, 1944, in the said County of Pima, State of Arizona, the plaintiff contends that the defendant, Paul Myers, offered for sale and [14] sold to numerous purchasers quantities of domestic malt beverages, to-wit: beer, at prices in excess of the legal maximum prices provided by said Maximum Price Regulation No. 259.

5. That it is agreed between these parties that maximum prices at which the said defendant, Paul Myers, might lawfully offer for sale or sell domestic malt beverages during the period above mentioned are established and determined by Section 1420.66, Appendix A(a) of the said Maximum Price Regulation No. 259.

6. It is further stipulated and agreed that the month of March, 1942, be considered the "base period" for the purpose of determining said maximum prices and that the proper method of computing the maximum prices on brands of beer not sold or offered for sale by the defendant during said month of March, 1942, but offered for sale and sold by him for the first time subsequent to the said month of March, 1942, shall be as provided by Section 3(a) (Section 1499.3(a)) of the General Maximum Price Regulation (7 F. R. 3153).

7. It is also stipulated by and between these parties that during the said month of March, 1942, the said defendant was engaged exclusively in the sale at wholesale of ABC beer and ale, products of Aztec Brewing Company, Inc. of San Diego, California, and that for the purpose of determining the proper maximum price of brands of beer other than ABC beer and ale the products of said Aztec Brewing Company, Inc. of San Diego, California, actually handled by said defendant during the month of March, 1942, shall be considered the "comparable commodity" referred to hereinabove.

8. In order to effect a settlement of this action it is hereby stipulated and agreed between these parties that, subject to the matters hereinafter reserved for future determination of this court, the actual overcharges demanded and received by the said defendant during the period alleged in plaintiff's complaint on file herein in connection with the sale of commodities described [15] in said com-

plaint and attached Exhibit "A" are the sum of \$27,426.14 and that, subject to and contingent upon determination of this court of the matters and legal questions hereinafter reserved for future decision favorable to the plaintiff, judgment be entered herein in favor of the plaintiff and against the defendant in the sum of \$27,426.14, which said judgment shall bear interest and be payable as hereinafter provided.

9. These parties further stipulate that in computing the overcharges during the period mentioned in plaintiff's complaint the plaintiff has made no allowance for return freight to the brewery on empty cases and bottles or brokerage commissions or finder's fees paid by said defendant in connection with the purchase and sale and handling of any of the commodities referred to in plaintiff's complaint, and that it is the contention of the plaintiff that said items do not properly constitute elements in defendant's net cost of the commodities described in plaintiff's said complaint under the provisions of the said Section 3(a) (1499.3(a)) of the General Maximum Price Regulation for the reason, among others, that no such return freight or commissions as such were paid during the month of March, 1942, by the said defendant in connection with the "comparable commodity" being handled and sold by defendant during the said month.

It is stipulated that during the said month of March, 1942, the cost of return freight on empty bottles and cases was absorbed by Aztec Brewing

Company, Inc. of San Diego, California, and not charged to said defendant nor paid by him, as such, and further that during the said month of March, 1942, the defendant paid no brokerage commissions or finder's fees in connection with the purchase of any malt beverage handled by him during said month.

That in response to request of defendant the letters hereto attached as Exhibits "A" and "B" were written to defendant [16] by the Phoenix District Office, Office of Price Administration.

10. That it is the contention of the defendant that in calculating maximum prices for commodities or brands thereof not handled or sold by him during March, 1942, but only during the period subsequent to said month, and in particular during the period mentioned in plaintiff's complaint, under the provisions of the regulation of the Office of Price Administration hereinabove mentioned and referred to more specifically, the said defendant is entitled to include as a proper part and element of his net unit cost of the said commodities, sums charged to him by his suppliers and actually paid by him in the form of commissions, brokerage charges, or finder's fees, and return freight to brewery on empty cases and bottles, and the determination of the controversy described in this, and the paragraph next preceding this paragraph, is hereby expressly reserved for this court, and in the event the said court should determine that any of the above mentioned charges properly constitute a part of or

element in defendant's net unit cost referred to and defined by the General Maximum Price Regulation hereinabove mentioned, then and in that event, the amount of the judgment to be entered herein in favor of the plaintiff and against the defendant shall be accordingly reduced.

11. That is is stipulated between these parties that in the event the court should find that return freight is a proper and legitimate element of net unit cost for the purpose of computing maximum prices of the commodities mentioned in plaintiff's complaint during the period therein set forth, the actual amount of the overcharges are to be reduced by the sum of \$4,223.30; that in the event the court should find that both return freight and commissions, brokerage charges, and finder's fees paid by said defendant in connection with the purchase of the aforesaid commodities constitute proper elements of net unit cost, the said actual overcharges on account thereof shall be reduced by the total sum [17] of \$9,086.14, and likewise the judgment to be entered herein in favor of the plaintiff against the defendant shall accordingly be reduced.

12. That further clarifying the preceding paragraph numbered 11., it is the intention and agreement of these parties that in the event this court should determine that return freight on empties should be allowed as an element of net unit cost, the judgment to be entered herein in favor of the plaintiff and against the defendant shall be the sum of \$23,202.84; that in the event the court should

determine that both the return freight and the brokerage commissions constitute proper elements of net unit cost of the commodities in question, the judgment to be entered herein in favor of the plaintiff and against the defendant shall be the amount of \$18,329.20.

13. That upon the determination of the aforesaid issues by the court, judgment shall be entered for the plaintiff and against the defendant for the benefit of the United States of America in such amount, not to exceed \$27,426.14, as the court may determine in accordance with the provisions of this stipulation and the applicable statutes and regulations pertaining to the subject matter hereof.

14. That any judgment which shall be entered herein pursuant to this stipulation shall be payable in the following manner and at the following times, unless the said defendant shall desire to sooner pay the same, to-wit: One-third thereof payable upon the entry of judgment and in no event later than ten (10) days thereafter; one-third, together with accrued interest, to be payable on or before (6) months from date of said judgment, and the balance thereof, together with accrued interest, payable on or before one (1) year from the date of said judgment; that all deferred payments shall bear interest from date of judgment until fully paid at the rate of four (4) per cent per annum. [18]

That in the event the said defendant shall pay or cause to be paid on or before the dates hereinabove provided the amounts hereinabove provided, to-

gether with accrued interest, no process shall issue for the collection or enforcement of said judgment, or any action or proceeding whatever to enforce payment of the same shall be instituted or brought; that in the event of default in making of any of the payments hereinabove provided or any part thereof promptly on the dates hereinabove specified, the whole of said judgment shall forthwith, and without notice to said defendant, become immediately payable and payment thereof may be enforced by the plaintiff or any other proper agency or department of the Government of the United States by any and all means provided by law for the collection and enforcement of judgments.

15. That this stipulation shall not be deemed effective until approved by the Judge of the above entitled court.

16. That attorneys for the defendant shall within thirty (30) days of the date of the filing of this stipulation, if they so desire, file herein a brief in support of defendant's contentions respecting the questions of law hereinabove expressly reserved for determination of this court; that within twenty (20) days of the date of filing defendant's said brief the attorneys for plaintiff may file herein their answering brief, and that attorneys for defendant shall be allowed the period of ten (10) days thereafter for the submission and filing of a reply brief, if they so desire.

That attorneys for either party may request oral argument on said contentions, provided such re-

quest is filed not later than the date of filing such reply brief.

Dated this 27th day of April, 1945.

/s/ DARRELL R. PARKER,
District Enforcement Attorney. [19]

/s/ LLOYD J. ANDREWS,
Assistant Enforcement Attorney

/s/ DAVID O. BROWN, LJA
Assistant Enforcement Attorney
Attorneys for Plaintiff.

/s/ PAUL MYERS,
Defendant.

KNAPP, BOYLE THOMPSON
B. G. THOMPSON,
Attorneys for Defendant.

[Endorsed]: Filed May 7, 1945.

ORDER OF APPROVAL

The above and foregoing stipulation having been presented to the court, and the court having duly considered the same:

It Is Hereby Ordered that the said stipulation be and it is hereby approved, and it is directed that the same be filed in this cause.

Dated this Eighth day of May, 1945.

ALBERT M. SAMES,
Judge, United States District
Court.

[Endorsed]: Filed May 8, 1945. [20]

EXHIBIT "A"

Phoenix District Office
Office of Price Administration
17 W. Van Buren Street
Post Office Box 650
Phoenix, Arizona

September 14, 1945

Mr. Paul L. Myers
302 So. Park Avenue
P. O. Box 2832
Tucson, Arizona

Dear Mr. Myers:

Today, we received an answer from the Regional Office to our inquiry on including the cost of return of empty bottles in your net replacement cost. The Regional Office advises us that its conclusion is that return freight on empty bottles may be included in your net cost for the purpose of pricing your beer under Section 3(a) of General Maximum Price Regulations.

Your correct method of pricing Capitol Beer sold by you is, then, as follows:

1. The comparable commodity you are using is,

I believe, ABC Beer. Take your maximum price under OPA regulations for that beer.

2. Divide this price by the net unit replacement cost of ABC Beer.

3. Multiply the percentage so obtained by your net unit cost of Capitol Beer or the beer being priced. This unit replacement cost may include the cost of Capitol Beer at the brewery, the loading charge at the brewery, freight on full cases and freight on the return of the empty bottles to the brewery.

Under Section 3(a) of General Maximum Price Regulation, all customary allowances, discounts or other price differentials shall apply to the sale of the commodity being priced. Therefore, you must give the same quantity discounts on Capitol Beer that you have established for ABC Beer.

This letter may be considered an official interpretation, and if you have any further question regarding its application, you may communicate directly with this office, and if you question its application to your problem, request that we send the question to our Regional Office for consideration by them and for clarification of doubtful points.

Very truly yours,

RICHARD A. HARVILL,

District Price Executive.

By: /s/ BETTY C. FREDERICKSON

District Price Attorney. [21]

EXHIBIT "B"

Phoenix District Office
17 W. Van Buren Street
Post Office Box 650
Phoenix, Arizona

September 29, 1944

Mr. Paul L. Myers
302 So. Park Avenue
P. O. Box 2832
Tucson, Arizona

Dear Mr. Myers:

Since we wrote you concerning the pricing of Capitol Beer handled by you, on September 14th, the National Office of OPA has reversed the ruling of the Regional Office. The Washington ruling is that the cost of returning beer bottles to the supplier may not be considered part of the net cost of the commodity by pricing under Section 3(a) of General Maximum Price Regulation.

Thus, numbered paragraph 3 of our letter of September 14th should be modified to read:

"Multiply the percentage so obtained by your net unit cost of Capitol Beer or the beer being priced. This unit replacement cost may include the cost of Capitol Beer at the brewery, the loading charge at the brewery and freight on full cases."

This letter is to be considered an amendment to the interpretation given you in our letter of the 14th, so that the same privilege of questioning it is applicable and you may, if you wish, request

that the problem be considered by the regional office and if necessary, by the national office.

Under the circumstances, since this ruling came directly from the Washington office, I believe it is pretty final and that you must immediately recalculate your price on Capitol Beer.

Very truly yours,

RICHARD A. HARVILL,
District Price Executive.

By: /s/ BETTY C. FREDERICKSON
District Price Attorney.

cc: JAMES J. SILVER, Esq.,
84 W. Pennington,
Tucson

cc: OPA Tucson

cc: Enforcement Division [22]

[Title of District Court and Cause.]

Minute Entry of Tuesday, December 18, 1945
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

It Is Ordered that the plaintiff, Chester Bowles, have judgment herein against the defendant, Paul Myers, in the sum of \$18,329.20, and that counsel for the plaintiff prepare and submit form therefor.

[Title of District Court and Cause.]

COURT'S MEMORANDUM

Defendant's proposed findings of fact and conclusions of law having been presented to the Court and no objections thereto having been urged by plaintiff, Is Is Ordered that the Clerk file said findings of fact and conclusions of law as approved and entered by the Court and that the form of judgment appended to said findings of fact and conclusions of law be approved, filed, entered and spread upon the minutes as the judgment in this case.

The Court has determined to enter judgment for the plaintiff in the sum of \$18,329.20, the smallest amount stipulated for by the parties, for the following reasons:

(1) Net unit cost includes any cost lawfully charged by a supplier and paid by a seller such as the defendant herein;

(2) The defendant's new supplier's maximum price as fixed by the Office of Price Administration included return freight on empty beer bottles and such new supplier properly charged return freight on empty beer bottles;

(3) The return freight on empty beer bottles as charged by the new supplier is an item to be included in the defendant's net unit cost;

(4) The defendant, though including return freight on empty beer bottles and though including finder's fees in fixing his maximum price on the new

commodity as items of net unit cost none-the-less continued his customary allowances, discounts, etc., to his customers;

(5) Broker's or finder's fees were not prohibited during the period charged to have been unlawfully included by the defendant as an item to be included in defendant's net unit cost;

(6) By including return freight on empty beer bottles and finder's fees in the net unit cost of the eastern beer no increase in profit was afforded to the defendant on his sales of said eastern beer; [25]

(7) In determining upon the meaning to be given the maximum price regulations applicable in these proceedings, the Court has been mindful of the provisions of the Emergency Price Control Act that its purpose, among others, is to eliminate and prevent profiteering and that it enjoins any order or regulation requiring the determination of costs otherwise than in accordance with established accounting methods;

(8) The emergency price control act is primarily designed to prevent inflation by controlling profit through the establishment of a cost-profit ratio equivalent to that which existed during the so called "base period";

(9) The Act contemplates increases in costs with resulting increases in ultimate prices, but intends that profits shall not increase;

(10) The maximum price regulations pertinent

to this case appear to be intended to limit the profit of a seller (the defendant in this case) to that made by him on comparable transactions during the month of March, 1942.

In view of the foregoing, the Court is of the opinion that the defendant properly charged or included in his net unit cost the return freight on empty beer bottles and the broker's or finder's fees covered by the stipulation of the parties filed herein and that the contentions of the defendant as to the interpretation to be placed upon the maximum price regulations involved herein are correct.

Dated at Tucson, Arizona, this 29th day of March, 1946.

ALBERT M. SAMES

Judge.

[Endorsed]: Filed March 29, 1946. [26]

Title of District Court and Cause]

Minute Entry of Friday, March 29, 1946
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

It Is Ordered that the proposed findings of fact and conclusions of law presented by counsel for defendant be approved and filed as the findings of fact and conclusions of law herein, and

It Is Further Ordered that the form of judgment presented by counsel for defendant be approved, entered, filed and spread upon the minutes as the judgment herein. [28]

In the District Court of the United States
for the District of Arizona

No. Civ. 273—Tucson

CHESTER BOWLES, Adminisrator, Office of
Price Administration,

Plaintiff,

vs.

PAUL MYERS,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above entitled cause coming on for hearing on the 19th day of November, 1945, pursuant to stipulation of the parties, and having been heard by the Court without a jury, the parties appearing through their respective Counsel, and after hearing argument on behalf of the parties, and being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of said Court in said action are hereby made:

FINDINGS OF FACT

1. That the parties on the.....day of April, 1945 made and entered into a stipulation for judgment, which stipulation was approved by the Order of this Court on May 8, 1945, and was filed with this Court as a part of the record in this case;

2. That the facts set forth in said stipulation

are adopted by this Court as the facts upon which the decision of this Court is based, and that said stipulation and the exhibits attached thereto are incorporated herein by reference and made a part hereof as fully as if set out herein verbatim.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

1. That pursuant to the provisions of Maximum Price Regulation No. 259, and in particular pursuant to Section 3(a) (Section 1499.3(a)) of the General Maximum Price Regulations (7 F.R. 3153), the Defendant was entitled to include as an item of his costs his freight paid on empty cases and containers which Defendant was required to return to the brewery in order to purchase the beer; and further was entitled to include as an item of his costs the broker's or finder's fee paid by him to purchase the beer; [29]

2. That pursuant to said stipulation for judgment, approved May 8, 1945, the parties by express agreement and stipulation agreed that upon determination by this Court of the issues submitted by said stipulation, judgment shall be entered for Plaintiff and against the Defendant for the benefit of the United States of America.

3. That Plaintiff is entitled to judgment against the Defendant in the sum of Eighteen Thousand Three Hundred Twenty Nine and 20/100 (\$18,329.20) Dollars, and that said judgment shall

be payable in accordance with paragraph 14 of said stipulation approved May 8, 1945.

JUDGMENT

Wherefor, it is Ordered, Adjudged and Decreed that the Plaintiff do have and recover from the Defendant the sum of Eighteen Thousand Three Hundred Twenty Nine and 20/100 (\$18,329.20) Dollars, which judgment shall be payable in the following manner, at the following times, unless the Defendant shall desire to sooner pay the same, to-wit:

One-third thereof payable on the entry of judgment, and in no event later than ten (10) days thereafter; one-third, together with accrued interest, to be payable on or before six (6) months from the date of said judgment; and the balance thereof, together with accrued interest, payable on or before one (1) year from the date of said judgment, provided that all deferred payments shall bear interest from date of judgment until paid at the rate of four (4%) per cent per annum. It is further Ordered that in the event that said Defendant shall pay or cause to be paid on or before the dates hereinabove provided, the amounts hereinabove provided, together with accrued interest, no process shall issue for the collection or enforcement of said judgment, or any action or proceeding whatever to enforce payment of the same shall be instituted or brought; that in event of default in making of any of the payments hereinabove provided, or any part thereof, promptly on the date hereinabove specified, the

whole of said judgment shall forthwith and without notice to said Defendant become immediately payable, any payment thereof may be enforced by the Plaintiff or and other proper agency or department of the Government of the United States, by any and all means provided by law for the collection and enforcement of judgment.

Done in open Court this 29th day of March, 1946.

ALBERT M. SAMES

Judge of the District Court.

[Endorsed]: Filed March 29, 1946. [30]

[Title of District Court and Cause.]

ORDER SUBSTITUTING ADMINISTRATOR'S SUCCESSOR AS PARTY TO ACTION

Upon motion of Paul A. Porter, and the stipulation on file herein, and for good cause appearing therefor,

It Is Hereby Ordered, that Paul A. Porter, Administrator of the Office of Price Administration, be substituted as the Plaintiff herein in the place of Chester Bowles.

Dated this 23rd day of May, 1946.

HOWARD C. SPEAKMAN

Judge.

[Endorsed]: Filed May 23, 1946. [32]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Paul Porter, Administrator of the Office of Price Administration, Plaintiff above named, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in this action on or about March 29, 1946.

Dated: Phoenix, Arizona, this 22nd day of May, 1946.

/s/ AUSTIN CLAPP

/s/ HERBERT H. BENT

/s/ DAVID O. BROWN

Attorneys for Plaintiff.

A copy of the above Notice of Appeal was mailed to Knapp, Boyle, Bilby & Thompson, 907-915 Valley National Building, Tucson, Arizona, this 22nd day of May, 1946.

/s/ DAVID O. BROWN

[Endorsed]: Filed June 3, 1946. [34]

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND PROCEED-
INGS TO BE CONTAINED IN RECORD
ON APPEAL

To: Edward W. Scruggs, Clerk of the above Court, and Knapp, Boyle and Thompson, Attorneys for the defendant,—

Now comes Paul Porter, Administrator of the Office of Price Administration, plaintiff above named and appellant, by his attorneys, and designates the following records and proceedings in the above cause to be contained in the Record on Appeal:

1. Plaintiff's Complaint.
2. Defendant's Answer.
3. Stipulation.
4. Order Approving Stipulation.
5. Order for Judgment Against the Defendant.
6. Court's Memorandum.
7. Findings of Fact and Conclusions of Law and Judgment.
8. Order Substituting Administrator's Successor. [36]
9. Notice of Appeal.
10. This Designation.

Dated at Phoenix, Arizona this 11 day of July, 1946.

/s/ DAVID O. BROWN

/s/ HERBERT H. BENT

/s/ AUSTIN CLAPP

[Endorsed]: Filed July 11, 1946. [37]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Pursuant to Rule 73 (g), good cause appearing therefor, it is hereby ordered that the time for filing and docketing of record on appeal in the above entitled cause be extended to August 31, 1946.

Dated: July 12, 1946.

HOWARD C. SPEAKMAN

United States District Judge

[Endorsed]: Filed July 12, 1946. [39]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

On the appeal taken by the plaintiff from the final judgment herein, plaintiff will urge and rely upon the following points:

1. The court erred in concluding as a matter of

law that pursuant to the provision of MPR No. 259, and in particular pursuant to Section 3 (a) (Sec. 1499.3(a)) of the General Maximum Price Regulation (7 F.R. 3153), the defendant was entitled to include, as an item of his costs, his freight paid on empty cases and containers which defendant was required to return to the brewery in order to purchase the beer; and further was entitled to include as an item of his cost, the broker's or finder's fee paid by him to purchase the beer.

2. That the court erred in failing to hold as a matter of law that defendant was not entitled to include as an item of his cost, either the freight paid by him on empty cases and containers, which defendant was required to return to the brewery in order to purchase beer, or the broker's or finder's fee paid by him to purchase the beer.

3. That the court erred in failing to award judgment for plaintiff for at least \$18,329.20, plus the freight paid by defendant on empty cases and containers which defendant was required to return to the brewery in order to purchase beer and the broker's or finder's fee paid by him to purchase the beer.

/s/ AUSTIN CLAPP,

/s/ WILLIAM B. WETHERALL,

/s/ DAVID O. BROWN.

[Endorsed]: Filed July 24, 1946. [41]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Arizona,

County of Maricopa—ss.

I, Cecilia I. Schultz, being first duly sworn, depose and say: That I am a secretary in the Office of Price Administration, 17 West Van Buren, Phoenix, Arizona; that I have served defendant with Statement of Points on Appeal, by mailing copy thereof, postage prepaid, addressed to:

Knapp, Boyle, Bilby & Thompson, 907-915 Valley National Building, Tucson, Arizona, they being attorneys for defendant herein, this 23rd day of July, 1946.

/s/ CECILIA I. SCHULTZ,

Subscribed and sworn to before me this 23rd day of July, 1946.

JOHN L. BRINKERHOFF,
Notary Public in and for the County of Maricopa,
State of Arizona.

My commission expires Feb. 6, 1947.

[Endorsed]: Filed July 24, 1946. [42]

In the District Court of the United States
For the District of Arizona

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the District Court of the United States for the District of Ari-

zona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Paul A. Porter, Administrator of the Office of Price Administration, Plaintiff, versus Paul Myers, Defendant, numbered Civ-273-Tucson on the docket of said Court.

I further certify that the attached pages, numbered 1 to 42, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation of Record and Proceedings to be contained in Record on Appeal filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$8.40, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the Seal of the said Court this 5th day of August, 1946.

[Seal] /s/ EDWARD W. SCRUGGS,

Clerk. [43]

United States Circuit Court of Appeals
In and for the Ninth Circuit

No. 11405

PAUL PORTER, ADMINISTRATOR, Office of
Price Administration,

Appellant,

vs.

PAUL MYERS,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

Appellant hereby adopts as the points upon which he will rely in this Appeal the Statement of Points appearing in the Transcript of Record certified by the Court below.

The Clerk will please print the Record in this cause as designated in and certified by the Court below together with the above Statement and this Designation.

/s/ AUSTIN CLAPP,

/s/ WILLIAM B. WETHERALL,

/s/ DAVID O. BROWN,

Attorneys for Appellant.

[Endorsed]: Filed Sept. 7, 1946.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

Mary Y. Cohen, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the City and County of San Francisco; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is c/o Office of Price Administration, San Francisco Regional Office, 1355 Market Street, San Francisco 3, California; that on the 6th day of September, 1946, affiant served the attached Statement of Points on Appeal and Designation of Record upon the Appellee in said action by placing a copy thereof in a franked envelope addressed to Appellee's counsel of record at the office address as follows:

Knapp, Boyle & Thompson, Valley National Building, Tucson, Arizona.

and by then sealing said envelope and depositing the same, franked as aforesaid, in the United States mail at San Francisco, California.

That there is delivery service by United States mail at the place so addressed, and there is a regular

communication by mail between the place of mailing and the place so addressed.

/s/ MARY Y. COHEN.

Subscribed and sworn to before me this 6th day of September, 1946.

[Seal] JAMES S. MULVEY,
Notary Public in and for the City and County of
San Francisco, State of California.
My commission expires Oct. 7, 1946.

[Endorsed]: Filed Sept. 7, 1946.

[Endorsed]: No. 11405. United States Circuit Court of Appeals for the Ninth Circuit. Paul A. Porter, Administrator of the Office of Price Administration, Appellant, vs. Paul Myers, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 14, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.